Supreme Court, U.S.
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No. 02-1474

IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* UNITED TELECOM COUNCIL AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the court below erred as a matter of law in holding that pole attachments are a "nonrivalrous" taking of utility property.

2. Whether the failure of the court to consider the merits of petitioner's rate for cable attachments effectively denied it judicial review in violation of its due process rights.

3. Whether the Supreme Court should grant certiorari to prevent widespread irreparable harm that would result if the decision becomes effective.

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PRELIMINARY STATEMENT[1]

The United Telecom Council ("UTC") and the Edison Electric Institute ("EEI") respectfully submit this brief as amici curiae, pursuant to Rule 37 of the Rules of this Court,

[1] In accordance with this Court's Rule 37.6, UTC and EEI respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

in support of Petitioner. The *amici curiae* have obtained the consent of the parties to file this brief pursuant to this Court's Rule 37(a).

INTEREST OF UTC and EEI

UTC and EEI are trade associations, whose members include utilities that are required by Section 224 of the Communications Act of 1934 to provide access at just and reasonable rates for pole attachments by telecommunications providers and cable television systems. UTC and EEI have participated in various administrative proceedings and judicial actions concerning the federal regulation of pole attachments. As such, UTC and EEI are pleased to provide the perspective of the industry concerning the questions that are currently before the Court in this matter.

The United Telecom Council is the trade association for the telecommunications and information technology interests of electric, gas, water and steam utilities, pipeline companies and other critical infrastructure industries worldwide. The members of UTC include investor-owned, municipal and cooperatively organized utilities. UTC seeks to provide a favorable business, regulatory and technological environment for companies that own, manage or provide critical infrastructure telecommunications systems in support of their core businesses.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve 99 percent of all customers served by the shareholder segment of the U.S. industry. It frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

The participation of UTC and EEI as *amici curiae* would be helpful to the Court to provide the perspective of the electric and other power utility industries concerning pole attachment regulations and to provide factual information

concerning pole attachment practices and industry trends. This information will help to explain why this Court should grant certiorari.

The utility members of UTC and EEI own or control the vast majority of the poles, ducts, conduit and rights-of-way that are subject to state or federal pole attachment regulation. Although many poles are jointly owned with telephone companies (especially with the incumbent local exchange carriers), the utility share has increased since the advent of pole attachment regulation.[2] Thus as a practical matter, most of the burden falls on utilities, even though both utilities and local exchange carriers are subject to pole attachment regulation.[3]

The reason for the trend toward electric ownership of these "telephone poles" is simple. Electric utilities remain focused on the energy services that they provide, especially on the transmission and delivery of that energy, and continued ownership and control of poles enables them to ensure the safe and reliable delivery of those services to the public. Electric utilities are required by state law to meet strict service quality levels, further underlining the need to maintain control over the poles, using their own employees

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[2] Based on an informal survey by EEI of its investor-owned utility members in 2001. Many of the largest utilities responded to the survey, and the sampling indicated that utilities own between 63% and 75% of the poles that are, or are likely to be used for pole attachments. *Compare* S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121 (finding that "[o]f the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private.")

[3] Whereas utilities must provide access at regulated rates to more infrastructure, they may not assert those rights on their own behalf, unlike telecommunications carriers that are not incumbent local exchange carriers.

that are in the majority of cases union-organized.[4] Moreover, the National Electric Safety Code restricts the types of attachments and the manner in which they may be made.[5] Revenues from pole attachment rates are typically rolled back to the ratepayers in the form of reductions in the cost of pole plant, completely discounting any notion that utility rates for access to poles, ducts, conduits and rights of way, or utility ownership of pole infrastructure, is motivated by profits from pole attachments.

The term "attachment" and the phrase "attachment rates" apply to more than just cable (or other "wireline") attachments to utility poles used for the distribution of electricity. The rates at issue in this proceeding are for access to electric utility distribution poles for the purpose of affixing facilities for the provision of cable television or other "wireline" services. Thus, these rates are referred to as "attachment rates." However, the Pole Attachment Act of 1978, as amended by the Telecommunications Act of 1996 (the "Pole/Telecomm Act"), applies also to other types of utility poles, as well as to "ducts, conduits, and rights of way." In addition, the Federal Communications Commission ("FCC" or "Commission") has held that the Pole/Telecomm Act

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[4] *See e.g.* Mich. Comp. Laws Ann. § 46.10p(5)-(8)(West 2001); N.J. Stat. Ann. § 48:2-23 (West 2001); Ohio Rev. Code Ann § 4928.10 (Anderson 2001); Or. Rev. Stat. § 757.649(2) (1999); Tex. Util. Code Ann. § 38005(a) (West 2000).

[5] The National Electrical Safety Code(R) ("*NESC*"), published by the Institute of Electrical and Electronics Engineers, Inc. ("IEEI") adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of (1) conductors and equipment in electric supply stations, and (2) overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. The *NESC* is a voluntary standard; however, some editions and some parts have been adopted, with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

applies to non-wireline attachments, such those enabling wireless services like cellular telephony—so-called "wireless attachments." *See Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151,* Report and Order, 13 FCC Rcd. 6777 (1998), rev'd *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd. National Cable & Telecomm. Ass'n. v. Gulf Power*, 534 U.S. 327 (2002). Therefore, rates for access to all such utility property, whether for wireline or wireless equipment, are commonly referred to as "attachment" rates. Because the relevant market concerns all attachments, whether wireline or wireless, and regardless of whether to poles or other utility property, much of the supporting material cited herein by *amici* concerns access to rights of way and attachments for equipment used to provide "wireless attachments".

The FCC has not developed a precise rate formula or principles under the Pole/Telecomm Act for "attachments" to such non-distribution utility property.[6] Despite this lack of Commission action, however, takings issues raised regarding attachments to rights of way, and market factors related to wireless attachments, are directly pertinent to this case. The Fifth Amendment applies to takings of any property, regardless of its nature, and regardless of the purposes for which it is taken. Thus, the takings issues in this case are identical to the takings issues involved in the Pole/Telecomm Act-mandated "attachments" to, and attachment rates for, non-distribution utility property and wireless attachments.

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[6] In particular, this includes attachments—especially wireless attachments—to utility transmission poles. Transmission poles have a much higher cost structure than distribution poles, and utilize a different set of accounts in the financial records utilities are required to maintain by the Federal Energy Regulatory Commission. Due to this different, and much higher, cost structure, the attachment rate at issue in this case is even less appropriate for use regarding attachments to transmission poles, or in situations involving wireless attachments to any utility property.

Because both the Fifth Amendment and the Pole/Telecomm Act apply equally to all utility property, those issues should not be re-argued before the Commission and re-litigated before the courts if they can be addressed fully and settled in this case. That would be an unfair imposition of unnecessary litigation costs on utility property owners, and also a serious waste of judicial resources.

STATEMENT OF THE CASE

Ever since the passage of the Pole Attachment Act of 1978, utilities have sought just compensation for pole attachments. This Court held that the 1978 Act did not effect a taking because utilities were not compelled to provide pole attachments. Thus, the Court did not reach the question of just compensation. After the Telecommunications Act of 1996 required utilities to provide mandatory access, pole attachment regulation did effect a *per se* taking of utility property, but the courts denied two facial challenges to the statute and the FCC rates. This case now brings a specific set of circumstances that presents a controversy fully ripe for review by the Court.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of the Reasons

This Court should grant certiorari to instruct the FCC that it must provide just compensation for the petitioner, to provide clear guidance that full market value is the appropriate measure of the constitutionally mandated just compensation, and to reject the precedent that marginal costs provides an appropriate measure of just compensation for the physical taking of property. Moreover, the Court should grant certiorari in this case because Petitioner has been denied judicial review in violation of its constitutional rights to due process, because the court below completely ignored its factual arguments supporting an attachment rate higher than

that allowed by the Commission. In addition, the court below failed utterly to apply the appropriate constitutional standard for a physical taking. Instead, the court fashioned a novel theory that the marginal costs of pole attachments are all that the Fifth Amendment requires for just compensation. This theory was primarily based on a single case that was a *regulatory* taking, and thus did not adopt a *per se* analysis for just compensation. The FCC and cable companies may now use that theory to justify cable rates that will have the practical effect of a general rule, even though the theory may be applied in the limited context of a pole attachment complaint proceeding. Therefore, the decision below was wrong in rationale as well as result and will cause irreparable harm to the industry if not rejected immediately.

The decision below manifests the dangers of this Court's decision in *Brown*. Here, utility property is rendered valueless on the theory that, but for the taking, the property would be presumed to have no value. The court capped just compensation at marginal costs unless a utility could demonstrate "for each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." The court explained that pole attachments are *nonrivalrous*, that "use by one entity does not necessarily diminish the use and enjoyment of others." Even if that were true, which it is not, the underlying principle renders the Takings Clause meaningless if the government is permitted to invent a theory under which property might lack value.

The reality is that pole attachments are a valuable commodity. Cable television and telecommunications service providers profit significantly from the services they deliver via pole attachments. Of course, the value of property taken by the Government is measured by what the owner has lost, not what the taker has gained; but regulated utilities have

provided pole attachments for many decades, since long before pole attachments were regulated. Moreover, public utilities that are exempt from regulation and the Federal government have recovered market-based rates for pole attachments and similar lease arrangements. Similarly, regulated utilities continue to share joint management costs with incumbent local exchange carriers, and the fees involved are far higher than the pole attachment rates at issue in this case. Finally, there is an undeniable disparity between the FCC's cable and telecommunications rates, proving the lie that cable attachments represent the highest and best use on which to value the occupied space. Therefore, under any measure—whether market value, actual cost, or opportunity cost—the FCC-required cable rate does result in very real losses to the regulated utility, for which it is entitled to just compensation.

I. THE COURT OF APPEALS DECISION DENIES DUE PROCESS

At the moment that Congress passed the Telecommunications Act of 1996 ("1996 Act"), utilities became entitled to just compensation for pole attachments. Prior to that, utilities were not required to provide pole attachments, and thus could not raise Fifth Amendment claims as to the regulated rate for pole attachments. *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)(holding that Section 224 lacked the element of "required acquiescence" necessary to treat pole attachments as a physical taking). The 1996 Act amendments transformed Section 224 into a *per se* taking of utility property for which utilities are entitled to just compensation. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (1999) ("*Gulf Power I*"). Specifically, Section 224(f)(1) requires that utilities provide nondiscriminatory access for pole attachments. 47 U.S.C. § 224(f) (2002).

Until now, the question of just compensation has not been ripe for review. The Eleventh Circuit Court of Appeals held that there was an adequate process for obtaining just

compensation for the taking effected by the mandatory access provision of Section 224(f)(1). *Gulf Power I*, 187 F.3d at 1332. Utilities had argued that pole attachment regulation violated separation of powers principles, because Congress had both authorized the taking and conclusively determined the value of just compensation. *Id. citing Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). The court brushed aside those concerns, holding that "[s]o long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of 'provid[ing] an adequate process for obtaining compensation.'" *Id.* at 1334, *citing Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

The availability of judicial review of a FCC pole attachment complaint proceeding does not satisfy constitutional concerns if the court does not adequately review the merits of an appeal, as is the case here. The U.S. Court of Appeals for the Eleventh Circuit refused to consider the evidence supporting the cable rate that the FCC rejected, apparently because the court concluded that only marginal costs are required for just compensation for pole attachments. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002). It held instead that the FCC need not consider the evidence concerning just compensation above marginal costs, unless there is a material fact in dispute, such as "whether a pole network is operating at full capacity." *Id.*

Ironically, the utility industry finds itself right back at square one. First, utilities were told they had no right to just compensation, because the 1978 Act did not effect a taking of utility property. *Florida Power,* 480 U.S. at 251. Having shown that the 1996 Act amendments do effect a taking, utilities then were told they needed a specific set of circumstances before the courts could consider just compensation.

See Gulf Power Co. v. FCC, 208 F.3d 1268, 1273-1274 (11th Cir. 2000)("*Gulf Power II*"), *citing Gulf Power I*, 187 F.3d at 1336. Now, the same court is telling utilities that the court will not consider the specific circumstances before it, because the court is satisfied that just compensation *is* provided under an abstract legal principle that the court has conjured, based on one case that is inapposite to the type of taking at issue in pole attachment regulation. Moreover, judicial review is effectively foreclosed in the future, because utilities must now make a *prima facie* case based upon a completely unrealistic set of circumstances required under the court's reasoning. *See Section II, infra.* Therefore, UTC and EEI submit that this Court must grant certiorari to consider the merits of this case, in accordance with *Monongahela* and to provide meaningful due process for utilities.

II. THE COURT OF APPEALS DECISION APPLIES REGULATORY TAKINGS PRINCIPLES TO A PHYSICAL TAKING.

The root of the problem with the decision below lies with the court's guiding legal principle at the heart of the case. "The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken." *Alabama Power Co.*, 311 F.3d at 1369. That may be true, but the court went awry when it surmised that just compensation for pole attachments was limited to the marginal costs to utilities, based upon its conclusion that pole attachments are "*nonrivalrous*", meaning that "the use by one entity does not necessarily diminish the use and enjoyment of others." *Id.* The court opined that utilities might be entitled to just compensation above marginal costs if they show opportunity costs with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. *Id.* at 1370. This Sisyphean evidentiary burden is completely

unrealistic to meet for each and every one of the millions of utility distribution poles. Even if it could be met, it could result in two different rates applying for cable television attachments, which would defeat the mandate of Section 224(f) to provide nondiscriminatory access for pole attachments. *See* 47 U.S.C. § 224(f). Thus, the legal principle espoused by the court is practically problematic and in conflict with the most basic principle (nondiscrimination) of the 1996 Act amendments.

Moreover, the rationale of the court below is fundamentally flawed because it is based upon a single case that involves a regulatory taking, which requires a different just compensation analysis than the physical taking at issue in pole attachments. The court relied upon *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986) in which Amtrak was awarded access at regulated rates for trackage rights. The court explained that, "*Metropolitan Transportation* involved something close to a nonrivalrous good," because "[a]llowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded." *Alabama Power Co.*, 311 F.3d at 1370. But, a closer reading of the case reveals that the court did not treat trackage rights as a taking; it stated that "requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public . . . fits more into the regulatory rather than the taking mode as those terms have traditionally been applied in American courts." *Metropolitan Transportation*, 792 F.2d at 296. In dicta, it did reject the argument that just compensation for trackage rights could be more than "avoidable" (i.e. marginal) costs, because the owner's "investment backed expectations" were only marginal costs to begin with. *Id.* at 297.

That is entirely different from pole attachments, which unlike transitory trackage rights, effect a permanent physical occupation of utility property, no less than the cable lines in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In fact, the court below conceded that "this case *does* in fact, trigger the *Loretto* analysis because of the element of compulsion in the 1996 Act." *Alabama Power Co.*, 311 F.3d at 1368. Nonetheless, the court analogized that pole attachments were less like land and more like trackage rights, which allowed it to depart from the "willing buyer, willing seller" standard for just compensation that applies to *per se* takings. *Id.* at 1369.

As the courts have repeatedly held, pole attachments are a permanent physical occupation of utility property. *See Gulf Power I*, 187 F.3d at 1328; *and Gulf Power II*, 208 F.3d at 1273-1274. The presence of one attachment *does* necessarily exclude the use of the occupied space by another or for utility core purposes. *Compare Loretto*, 458 U.S. at 434-435 (stating that a permanent physical occupation of property is a taking without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner.) The court below failed to acknowledge this contradiction with case precedent, and it cited no evidence on the record to support its own hypothetical assertion that utilities suffer no net loss from pole attachments.

In fact, every additional attachment to a pole (especially) or any other utility property makes it that much more difficult to provide safe and reliable service to utility customers. That is one of the fundamental reasons why utilities may deny access under the Pole/Telecomm Act for safety and engineering reasons. *See* 47 U.S.C. § 224(f)(2). As utilities made quite clear to the Commission during its rulemaking proceedings

addressing the 1996 Act amendments,[7] attachments (especially wireline attachments) put a substantial physical burden (weight and wind-loading) on utility plant. All attachments require additional utility time and effort to manage, in both responding to requests for attachment and when the utility property is moved, repaired, or otherwise rebuilt. This takes time and energy away from addressing utility customer issues in ways that cannot be accounted for by the simplistic terms of the FCC's rate formulae. The court's reasoning is akin to declaring that citizens who have a government-determined "spare" room must house soldiers for a rate no more than the cost of the extra power and water used, and regardless of wear, tear, and inconvenience, unless the homeowner can prove it had an alternative renter waiting to pay a higher price. That is not the standard required under the Fifth Amendment, as amply set forth in the government's own *Uniform Appraisal Standards for Federal Land Acquisitions*. *See* Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions*, Sections B-2 and B-3 (5th ed. 2000) at *http://www.usdoj.gov/enrd/land-ack/yb2001.pdf* (visited April 30, 2003).

The view that the Fifth Amendment only guarantees just compensation for the net loss of a government taking divided this Court in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). There the Court held that interest earned in an IOLTA account is "'the private property of the owner of the principal.'" *Id.* at 1419, *citing Phillips v. Washington Legal Foundation,* 524 U.S. 156, 172 (2002). But, it ultimately concluded that just compensation for the IOLTA accounts should be zero, because funds in the trust accounts

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[7] Comments of the Edison Electric Institute and UTC, the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed June 27, 1997) *and see* Reply Comments of the Edison Electric Institute and UTC the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed Aug. 11, 1997).

held no value to the owners prior to the deposit of those funds in the IOLTA accounts. In short, the taking resulted in no net loss to the owner of the funds. *Id.* at 1420. The dissent objected to what it termed a "'Robin Hood Taking,' in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended." *Id.* at 1428.

UTC and EEI submit that the decision below presents the Court with an appropriate opportunity to clarify its decision in *Brown*. The decision below applies a *Brown*-like analysis to deny the value of pole attachments to utilities. *Alabama Power Co.*, 311 F.3d at 1369 (distinguishing pole attachments from real property because "the pole space is for practical purposes, nonrivalrous.") But, pole attachments do have value, as noted above and explained more fully herein, and pole attachments are a physical taking, not just a regulatory taking (or even a ratemaking). Therefore, not only should this case be reviewed on its own merits: *amici* herein suggest that it could also be reviewed in order to reexamine the legal principle applied in *Brown* and used below, that the Fifth Amendment only protects an owner from a net loss that results from a government taking of its property.

III. POLE ATTACHMENTS DO HAVE VALUE THAT CAN BE READILY DETERMINED

Even if the legal principle followed below is allowed to stand, this Court should still grant certiorari because utilities do incur a net loss in the value of poles, resulting from pole attachment regulation. While an IOLTA account may spur existential debate about its value for purposes of just compensation, there is no principled basis upon which to claim that there is no net loss of value to utilities that results from pole attachment regulation.

At the outset, there is the monetary value of the pole itself and all the maintenance costs associated therewith that are all reported in the various FERC accounts and that are factored into the FCC cable television and telecommunications attachment rates. As part of its just compensation case, petitioner and *amici* believe that the FCC cable rate excludes some actual, accountable costs that are attributable to pole attachments and which therefore should be included. *See* Comments of the Edison Electric Institute and UTC, the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed June 27, 1997) *and see* Reply Comments of the Edison Electric Institute and UTC the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed Aug. 11, 1997), *but see Amendment of the Commission's Rules Regarding Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, 16 FCC Rcd. 12103 (2001). But, the accounts that are included and the depreciation that accrues thereon are irrefutable proof of the value of the pole itself.

There is no denying that pole attachments make efficient use of utility infrastructure, which is one of the reasons that utilities provide pole attachments, even in the absence of regulation. But the court below should not have twisted that around to hold in essence that, but for the regulation, the value of the pole space would be nil. *See Alabama Power Co.*, 311 F.3d at 1369 (disputing that utilities incur losses from pole attachments in the same sense as land owners in a taking.) Contrary to the court below, there are comparable markets to determine fair market value. *Alabama Power Co.*, 311 F.3d at 1368 (stating that there is not an active, unregulated market for the use of "elevated communications corridors.") For example, public utilities and others that are exempt from Section 224 can and do negotiate fair market value for pole attachments. *See* 47 U.S.C. § 224 (a)(1)-(3). The Federal Government itself follows a policy of negotiating market rates for locating communications facilities on federal

property. *See* Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions*, (5th ed. 2000) at *http://www.usdoj.gov/enrd/land-ack/yb2001.pdf* (visited April 30, 2003). *See* GSA Bulletin FPMR D-242, 62 Fed. Reg. 32,611 (June 16, 1997)(*extended*, 64 Fed. Reg. 30523 (June 8, 1999)); GSA Bulletin FPMR D-246, at 63 Fed. Reg. 10,631 (Mar. 4, 1998) (*extended*, 64 Fed. Reg. 30523 (June 8, 1999)). Thus, the court erred when it concluded that "there is not an active, unregulated market for the use of 'elevated communications corridors,'" from which fair market value could be determined for pole attachments. *Alabama Power Co.*, 311 F.3d at 1368.

Additional strong evidence of a loss to utilities is the rates that apply to telecommunications carriers, most of all the incumbent local exchange carriers that share in the cost of jointly held poles. As petitioner has stated, its revised cable rate that the FCC struck down was consistent with the rates that it charges incumbents for the use of jointly owned poles. *See* Brief for Petitioner at 7. Similarly, under Section 224(e), even competitive telecommunications carriers are subject to a rate higher than the cable rate. 47 U.S.C. §224(e). Even if a court rejects as speculative the lost opportunity of providing pole attachments to attaching entities under a completely unregulated regime, there is no "discounting" the fact that telecommunications carriers—both incumbent and competitive—do in fact pay more for pole attachments, which is further evidence of the true value of pole attachments. *Compare Alabama Power Co.*, 311 F.3d at 1368. (stating that "it is irrelevant that the Telecom Rate provided in 47 U.S.C. §224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments.") Therefore, the Court should grant certiorari to provide just compensation beyond marginal costs of pole attachments.

IV. NATIONWIDE IRREPARABLE HARM WILL RESULT FROM THIS DECISION.

Section 224 applies to a utility, as defined by Section 224(a)(1), "who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). The term utility does not include, "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1). Section 224(c) permits a state to certify to the Commission that it regulates pole attachments in that state, at which time the Commission has no jurisdiction over pole attachments in that state until such time as the state fails to act on a pole attachment complaint for 180 days or complete action on the complaint for 360 days. 47 U.S.C. § 224(c). Eighteen states and the District of Columbia have certified that they regulate pole attachments. *See* States That Have Certified That They Regulate Pole Attachments, *Public Notice*, DA 92-201, 7 FCC Rcd. 1498 (1992). As such, Section 224 applies to those investor-owned utilities and local exchange carriers that operate in any one of the 32 states that have not reverse-preempted the FCC's pole attachment jurisdiction. Further, many of those states that do regulate pole attachments have borrowed the FCC rate methodologies for pole attachments.[8]

There are approximately 270 investor-owned utilities, serving an estimated 75% of the electric customers in the country. Many of these utilities have multi-state service territories extending over thousands of square miles. Their distribution networks that are subject to pole attachment regulation have grown over a hundred years to serve both

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[8] *See e.g.* ALASKA ADMIN. CODE tit. 3, § 52.920 (2002); CODE DEL. REGS. §10 800 016 (2002); *and* VT. CODE R. §30 000 007 (2002).

large and small population centers, and are primarily regulated by the states, which set depreciation cycles. These tend to run approximately twenty-five years for distribution pole plant.[9] As such, most of the utility distribution networks in the country, serving some of the largest markets, are subject to pole attachment regulation.

The FCC relies primarily on its enforcement authority to regulate pole attachment rates. From the outset, it was not authorized to prescribe rates, terms and conditions for CATV systems generally. S. Rep. No. 95-580, 95th Cong., 1st Sess., at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 ("1977 Senate Report") (FCC jurisdiction over pole attachments "does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements.") Instead, Section 224 itself sets the range of rates that are just and reasonable for either cable television or telecommunications attachments. 47 U.S.C. §§ 224(d)-(e). Thus, a FCC pole attachment complaint decision, such as this one, sets a precedent for the entire industry to follow. As such, the decision before the Court will have a direct and widespread effect on the industry, much as if it were a rulemaking.

That the FCC decision went against the utility is not surprising given decisions by the FCC in the past.[10] Over the course of almost thirty years of regulation and hundreds of adjudications, UTC and EEI are unaware of any case where

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[9] ALASKA ADMIN. CODE tit. 3., § 52.455 (2002); FLORIDA ADMIN. CODE ANN. R 25-6.04361 (2002); ILLINOIS ADMIN. CODE. tit. 83 § 605.339 (2002); *and* N.Y. COMP. CODES R. &REGS. tit. 16, Ch. II, Subch. F, Art. 1 (2002).

[10] *See e.g. Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion & Order, PA 97-002, 2003 WL 1477823; and *Teleport Communications Atlanta v. Georgia Power Co.*, Order on Review, PA-01-003, 17 F.C.C.R. 19,859 (2002); and *RCN Telecomms Svcs. of Philadelphia v. PECO Energy Co.*, Phase I Order, DA 02-3485, 17 F.C.C.R. 25,238 (2002).

the FCC has upheld a rate increase by a utility or even a rate already agreed upon in a contract between a utility and an attaching entity. This fact reinforces the importance of judicial review of such cases.[11] What is surprising is that a federal court has gone beyond rejecting the rate increase, and has prescribed a rate for just compensation purposes that is even lower than the FCC's already discounted rate. Although the effective date of the decision has been stayed pending review by the Supreme Court, if it becomes effective it certainly would create a ripple effect for ongoing pole attachment negotiations with investor-owned utilities throughout the country. Moreover, this would also have an unjustifiable and unauthorized impact on the unregulated market, as the FCC's allowable rate would inevitably be cited by attaching entities in any negotiations with unregulated entities. Already, the FCC is citing the decision for the proposition that utilities do receive just compensation for pole attachments.[12] Certainly, attaching entities are likely to use it to extract further discounts for pole attachments or to take a complaint to the FCC. Therefore, swift and immediate review of that decision by this Court is necessary to prevent widespread irreparable harm to utilities and to the operation of the market for unregulated attachments and related markets.

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[11] *See Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985)(rejecting FCC determination that cable rate charged by utility was excessive) *and Texas Power & Light v. FCC*, 784 F.2d 1265 (5th Cir. 1986)(holding that it was arbitrary for FCC to deny the utility the right to include deferred taxes in its tax base and that utility is entitled to include its investment in private rights-of-way as a component to the cable rate.)

[12] *See Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion & Order, PA 97-002, 2003 WL 1477823.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grants the Petition for Certiorari in this case.

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